

No. 12856

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United States  
Court of Appeals  
for the Ninth Circuit.

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OREGON CHROME MINES, INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

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Transcript of Record

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Petition to Review a Decision of the Tax Court  
of the United States.

FILED

MAY 27 1951

PAUL P. O'BRIEN,

CLERK



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Court of Appeals  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## APPEARANCES

For Petitioner:

WM. B. MURRAY, ESQ.

For Respondent:

R. G. HARLESS, ESQ.,

R. C. WHITLEY, ESQ.





The Tax Court of the United States

Docket No. 18515

OREGON CHROME MINES, INC., a Corporation,  
tion,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

Transferred to Judge Hill

DOCKET ENTRIES

1948

May 17—Petition received and filed. Taxpayer notified. Fee paid.

May 19—Copy of petition served on General Counsel.

July 15—Answer filed by General Counsel.

July 15—Request for hearing in Portland, Oregon, filed by General Counsel.

July 20—Notice issued placing proceeding on Portland, Oregon, calendar. Service of answer and request made.

1949

Aug. 22—Hearing set October 24, 1949, Portland, Oregon.

Oct. 26 &

27—Hearing had before Judge Arundell, on merits. Motion of petitioner to consolidate with dkt. 23902, granted. Motion to file amended petition, amended petition, amended answer, stipulation of facts, (mo-

1949

tion granted, copies served), filed at hearing. Briefs 12/12/49. Replies January 6, 1950.

Nov. 17—Transcript of hearing 10/26 and 27/49 filed.

Dec. 12—Brief filed by taxpayer. Copy served 12/13/49.

Dec. 12—Brief filed by General Counsel.

1950

Oct. 4—Findings of fact and opinion rendered, Hill, J. Decision will be entered under rule 50. Copy served.

Nov. 7—Respondent's computation filed.

Nov. 10—Hearing set Nov. 29/50 on respondent's computation.

Nov. 29—Hearing had before Judge Tietjens, on settlement, referred to Judge Hill.

Nov. 30—Decision entered, Black, J., Div. 15.

1951

Jan. 22—Petition for review by U. S. Court of Appeals, 9th Circuit, filed by taxpayer.

Jan. 22—Proof of service of petition for review acknowledged by General Counsel Jan. 3, 1951.

Jan. 22—Statement of points with proof of service 1/3/51 filed by taxpayer.

Jan. 22—Designation of record with proof of service 1/3/51 thereon filed by taxpayer.

Jan. 23—Proof of service of petition for review, statement of points, and designation of record filed.

[Title of Tax Court and Cause.]

## AMENDED PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue, in his notice of deficiency, Seattle Division, 305 A Jones Building, IT:90D:KLW, dated February 18, 1948, and as a basis for his proceeding alleges as follows:

### I.

The petitioner is a corporation, duly organized and existing under the laws of the State of Oregon, with its principal office at 3601 N.E. Union Avenue, Portland, Oregon. The return for the period here involved was filed with the collector for the district of Oregon.

### II.

The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on February 18, 1948.

### III.

The taxes in controversy are income tax and declared value excess profits tax and excess profits tax for the calendar year 1944, in the amounts of \$875.57 income tax, \$2,651.96 declared value excess profits tax, and \$15,404.74 excess profits tax.

### IV.

The determination of tax set forth in the said notice of deficiency is based upon the following errors:

1) The Commissioner of Internal Revenue erroneously failed and refused to hold taxpayer exempt from excess profits tax in the sum of \$15,404.74, and to find that taxpayer was a domestic corporation engaged in the mining of chromite, with its entire net income attributable to such mining in the United States.

2) The Commissioner erroneously limited depletion to percentage depletion of \$5,506.84, instead of cost depletion of \$24,000.00; and the Commissioner failed to recognize that the cost of taxpayer's mine was \$48,000.00, and not \$1,525.00, and failed to make reasonable allowance for depletion according to the peculiar conditions of taxpayer's case.

3) The Commissioner erroneously held that the sum of \$2,491.85 paid by taxpayer for services rendered to it was not deductible, inasmuch as the persons to whom said money was paid had an economic interest in the mineral in place, and the Commissioner erroneously added the \$2,491.85 to taxpayer's income for the year 1944.

## V.

The facts upon which the petitioner relies as the basis for this proceeding are as follows:

1) The taxpayer is a corporation organized, subsisting and existing under and by virtue of the laws of the State of Oregon, with authorized capital 48,000 \$1.00 par value shares.

2) Continuously since its organization, and dur-

ing 1944 and subsequently thereto, the taxpayer has been engaged as a domestic corporation in mining chromite, and all of the corporation's income has been attributable to such mining in the United States.

3) On or about July 2, 1941, the taxpayer borrowed \$5,000.00, which was expended in driving a tunnel for the purpose of developing chromite ore. Shipments were made from the mine. This work was done by day labor until about the 14th day of April, 1942, when the taxpayer entered into a written agreement with William S. Robertson, mining engineer.

4) After said agreement was entered into, the corporation's mining operations were carried on by contract and lease with said mining operator. A percentage of the ore or its value was agreed to belong to the operator supplying the labor for mining the ore, and a percentage was to belong to the taxpayer.

5) This contract for the extraction of ore on a percentage basis was subsequently modified on August 26, 1942, February 5, 1943, April 1, 1944, July 16, 1944, June 25, 1945, December 4, 1945, April 3, 1947, and May 2, 1947.

6) The modifications of said agreement did not materially change the basic arrangement concerning a division of the ore extracted, but related to the percentage each was to receive.

7) About June 7, 1944, the taxpayer launched a

program of prospecting for deposits of chromite and a program for the acquisition of other chromite deposits in southern Oregon and northern California.

8) On July 10, 1944, the taxpayer authorized the expenditure of \$3,000.00 for the purpose of prospecting, exploring and acquiring additional chromite ore and claims and to engage a mining engineer to make surveys thereof.

9) Although taxpayer sought to prospect, explore and acquire other deposits of chromite, nevertheless none were acquired. Some were inspected, prospected and rejected, and the money thus appropriated was expended.

10) The rock in place became ore during the extraordinary economic demand for chrome during the war emergency and the rock ceased to be ore when the emergency came to an end.

11) The ore in said mine was mined and sold and more than fifty per cent of the ore originally in said mine was removed during the year 1944 and another fifteen per cent of the original amount was removed in the year 1945, thus depleting the mine.

12) The discovery, locating and prospecting of the mine was done and financed in part by Max Krueger, Sig Dillsheimer and J. C. Haas, E.M.

13) The mine consists of claims known as Agnes No. 1 to Agnes No. 7, inclusive, Township 37 South, Range 9, West of the Willamette Meridian, about 16 miles from Selma on Oak Flat on the easterly



side of the Illinois River, Josephine County, Oregon. These claims were located in the name of Sig Dillsheimer, as appears of record in the Mining Records of Josephine County, Oregon, as follows:

Agnes No. 1, Volume 39, page 439, Jan. 5, 1940

Agnes No. 2, Volume 40, page 263, Oct. 24, 1940

Agnes No. 3, Volume 40, page 264, Oct. 24, 1940

Agnes No. 4, Volume 40, page 265, Oct. 24, 1940

Agnes No. 5, Volume 40, page 266, Oct. 24, 1940

Agnes No. 6, Volume 40, page 267, Oct. 24, 1940

Agnes No. 7, Volume 40, page 298, Jan. 13, 1941

14) That the persons contributing to the financing of the discovery, location, prospecting and development of said claims were the beneficial owners thereof, and title to said claims was held by Sig Dillsheimer for himself and for the benefit of those contributing money and services to said venture.

15) That by deed dated June 24, 1941, Sig Dillsheimer conveyed said mining claims, which deed was recorded at pages 234-235, Volume 13 Mining Conveyances, records of Josephine County, Oregon.

16) That on July 3, 1941, taxpayer issued to Sig Dillsheimer, in consideration of his conveyance to it of said mining claims, its stock certificate No. 1 for 47,997 shares.

17) Sig Dillsheimer transferred out of said certificate No. 1 certificates Nos. 5 to 17, inclusive, on July 3, 1941, 47,997 shares, retaining certificate No.

8 in his name for 10,150 shares and transferring the remainder of said certificate to the persons for whose benefit he had been holding said mining claims in trust.

18) The transfer of said claims for said shares was not substantially in proportion to the financial contributions nor time expended by the persons beneficially interested in said claims.

19) Certificates Nos. 5 to 17 were issued as follows:

Certif. No.	Name	No. Shares	Amount
5	J. C. Haas, E.M. ....	7,199	\$ 22.00
6	Marie Krueger .....	2,000	151.62
7	Gertrude Krueger .....	2,949	250.00
8	Sig Dillsheimer .....	10,150	191.68
9	Agnes Smith .....	4,800	
10	Garfield Voget .....	8,999	458.75
11	Marie Knauf .....	2,400	
12	Arnold Krueger .....	1,800	500.00
13	G. E. Heinlein .....	600	
14	Fred A. Ebel .....	1,200	150.00
15	Mrs. L. M. Case .....	1,500	150.00
16	Louis E. Johnson .....	2,000	
17	J. A. Gingrich .....	2,400	158.50
Totals.....		47,997	\$2,032.55

20) The taxpayer paid \$2,491.85 during the year 1944 to J. C. Haas, E.M., Sig Dillsheimer, Max Krueger, and others, for personal services rendered to taxpayer and said persons had no economic interest in the mineral in place in said mine.

Wherefore, the petitioner prays that this Court may hear this proceeding and determine that the Commissioner was in error in each and all of the particulars hereinabove alleged, and petitioner



prays that the court may determine that there is no deficiency for the aforesaid taxes, and your petitioner will ever pray.

Dated this 7th day of September, 1949.

/s/ WM. B. MURRAY,  
Attorney for Petitioner.

State of Oregon,  
County of Multnomah—ss.

We, Garfield Voget and Max Krueger, being duly sworn, each speaking for himself and not for each other, say: That Garfield Voget is the President and Max Krueger is the Secretary-Treasurer of Oregon Chrome Mines, Inc., and that we are duly authorized to verify the foregoing petition, and we have read the foregoing petition and are familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those we believe to be true.

/s/ GARFIELD VOGET,

/s/ M. E. KRUEGER.

Subscribed and sworn to before me this 7th day of September, 1949.

[Seal] /s/ KATHERINE DUNIWAY,  
Notary Public for Oregon.

My Commission Expires 10/2/51.

## EXHIBIT "A"

Treasury Department  
Internal Revenue Service  
Seattle 1, Washington

February 18, 1948

Office of  
Internal Revenue Agent in Charge  
305-A Jones Building  
1331 Third Avenue  
IT :90D :KLW

Oregon Chrome Mines, Inc.  
c/o Portland Business Service Co.

Mr. E. R. Tower  
3601 N. E. Union Avenue  
Portland 12, Oregon

Gentlemen:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1944, discloses a deficiency of \$875.57, and that the determination of your declared value excess profits tax liability for the year mentioned discloses a deficiency of \$2,651.96, and that the determination of your excess profits tax liability for such year discloses a deficiency of \$15,404.74 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturdays, Sunday, or a legal holiday in the District of Columbia as

the 90th day) from the date of the mailing of this letter, you may file a petition with the Tax Court of the United States, at its principal address, Washington 25, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Seattle 1, Washington, for the attention of IT:90D:KLW. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEO J. SCHOENEMAN,  
Commissioner.

By /s/ S. R. STOCKTON,  
Internal Revenue Agent in  
Charge.

KLW :mts

Enclosures:

Statement

Form of Waiver

IT:90D:KLW

## STATEMENT

Oregon Chrome Mines, Inc.  
c/o Portland Business Service Co.

E. R. Tower  
3601 N. E. Union Avenue  
Portland 12, Oregon

## Tax Liability for the Taxable Year Ended December 31, 1944

	Liability	Assessed	Deficiency
Income Tax .....	\$ 2,816.44	\$1,940.87	\$ 875.57
Declared Value			
Excess Profits Tax .....	3,801.45	1,149.49	2,651.96
Excess Profits Tax .....	15,404.74		15,404.74
Totals.....	\$22,022.63	\$3,090.36	\$18,932.27

In making this determination of your income, declared value excess profits tax and excess profits tax liabilities, careful consideration has been given to the report of examination dated July 29, 1947.

A copy of this letter and statement has been mailed to your representative, Mr. Wm. B. Murray, 825 Yeon Building, Portland 4, Oregon, in accordance with the authority contained in the power of attorney executed by you.

## Adjustments to Net Income

Net income as disclosed by return.....	\$ 8,708.25
Unallowable deductions and additional income:	
(a) Net operating loss deduction .....	\$ 1,597.46
(b) Depletion .....	18,493.16
Net income, adjusted.....	\$28,798.87

## Explanation of Adjustments

(a) It has been determined that the net operating loss deduction allowable in 1944 is none. You deducted on the return \$1,597.46. Therefore, net income is increased by this amount.

(b) It has been held that total depletion allowable based on the percentage method does not exceed \$5,506.84. Depletion based on the unit cost method does not apply as total depletion allowable computed on this basis would not exceed \$454.33. Depletion was deducted on the return in the total amount of \$24,000.00; therefore, net income is increased \$18,493.16.

## Declared Value Excess-Profits Tax Computation

Net income, adjusted .....			\$28,798.87
	Amount	Rate	
5% of declared value of capital stock....	none		
Balance .....	\$28,798.87	13.2%	3,801.45
Declared value excess profits tax assessed Account No. 4200551 .....			1,149.49
Deficiency of declared value excess-profits tax.....			\$ 2,651.96

## Income Tax Computation—Normal-Tax Net Income Computation

Net income, adjusted .....	\$28,798.87
Less: Adjusted excess profits net income .....	17,997.24
Normal-tax and surtax net income.....	\$10,801.63

## Normal Tax Computation

Domestic Corporations With Normal-Tax Incomes Not Over \$50,000			
Normal-tax net income .....			\$10,801.63
	Portion	Rate	Amount of Tax
Portion of normal-tax net income (not in excess of \$5,000) and tax.....	\$5,000.00	15%	\$ 750.00
Portion of normal-tax net income (in excess of \$5,000 and not in excess of \$20,000) and tax.....	5,801.63	17%	986.28
Total normal tax.....			\$1,736.28

## Corporations With Surtax Net Incomes Not Over \$50,000

	Portion	Rate	Amount of Tax
Portion of surtax net income (not in excess of \$25,000); and tax.....	\$10,801.63	10%	\$1,080.16
Tax liability .....			2,816.44
Income tax assessed: Account No. 4200551.....			1,940.87
Deficiency of income tax .....			\$ 875.57

## Excess Profits Tax Computation

1. Excess profits net income per return .....	\$ 8,691.93
2. Add: Increase to net income .....	20,090.62
3. Excess profits net income .....	\$28,782.55
4. Less: Specific exemption .....	\$10,000.00
5. Excess profits credit .....	197.91
6. Unused excess profits credit adjustment.....	567.40
	10,765.31

7. Adjusted excess profits net income.....	\$18,017.24
8. 95% of item 7.....	17,116.38
9. Surtax net income .....	28,798.87
10. 80% of item 9.....	23,039.10
11. Income tax .....	2,816.44
12. Excess of item 10 over item 11.....	\$20,222.66
13. Item 12, or item 8, whichever is lesser.....	17,116.38
14. Less: Credit—Section 784 .....	1,711.64
15. Correct excess profits tax liability .....	\$15,404.74
16. Previous assessment .....	none
17. Deficiency in excess profits tax .....	\$15,404.74

Filed at hearing Oct. 26, 1949, T.C.U.S.

[Title of Tax Court and Cause.]

## ANSWER TO AMENDED PETITION

Comes Now the Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and for answer to the amended petition filed herein admits and denies as follows:

1. Admits the material allegations contained in Paragraph I of the amended petition.

2. Admits the material allegations contained in Paragraph II of the amended petition.

3. Admits the material allegations contained in Paragraph III of the amended petition.

4. (1) to (3) inclusive. Denies that he erred in his determination of the deficiency as shown by the notice of deficiency from which petitioner's appeal



is taken. Specifically denies that he erred in the manner and form alleged in Paragraph IV (1) to (3), inclusive, of the amended petition.

5. (1) Admits the material allegations contained in Paragraph V, sub-paragraph 1, of the amended petition.

(2) Denies the material allegations contained in Paragraph V, sub-paragraph 2, of the amended petition.

(3) Admits that on the 14th day of April, 1942, the petitioner entered into a written agreement with William S. Robertson, mining engineer. Denies the remaining material allegations contained in Paragraph V, sub-paragraph 3, of the amended petition.

(4) Denies the material allegations contained in Paragraph V, sub-paragraph 4, of the amended petition.

(5) Admits that the contract was subsequently modified. Denies the remaining material allegations contained in Paragraph V, sub-paragraph 5, of the amended petition.

(6) to (12), inclusive. Denies the material allegations contained in Paragraph V, sub-paragraphs 6 to 12, inclusive, of the amended petition.

(13) Admits that the mine consists of claims known as Agnes No. 1 to Agnes No. 7, inclusive, Township 37 South, Range 9 West of the Willamette Meridian, about 16 miles from Selma on Oak Flat on the easterly side of the Illinois River, Jose-

phine County, Oregon. Admits that these claims were located in the name of Sig Dilsheimer. Denies the remaining material allegations contained in Paragraph V, sub-paragraph 13, of the amended petition.

(14) Admits that the title to said claims was held by Sig Dilsheimer for himself and others. Denies the remaining material allegations contained in Paragraph V, sub-paragraph 14, of the amended petition.

(15) Admits the material allegations contained in Paragraph V, sub-paragraph 15, of the amended petition.

(16) Admits the material allegations contained in Paragraph V, sub-paragraph 16, of the amended petition.

(17) and (18). Denies the material allegations contained in Paragraph V, sub-paragraphs 17 and 18, of the amended petition.

(19) Admits that certificates numbered 5 to 17 were issued to the persons listed in sub-paragraph 19, and that the number of shares represented by said certificates were as shown in sub-paragraph 19, except respondent alleges that the name shown in the amended petition as Marie Krueger is in error. Denies the remaining material allegations contained in Paragraph V, sub-paragraph 19, of the amended petition.

(20) Denies the material allegations contained in Paragraph V, sub-paragraph 20, of the amended petition.



6. Denies generally and specifically each and every material allegation contained in the amended petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the petitioner's appeal be denied and that the Commissioner's determination of deficiency be approved.

/s/ CHARLES OLIPHANT,  
Chief Counsel, Bureau of  
Internal Revenue.

Of Counsel:

WILFORD H. PAYNE,  
Division Counsel.

JOHN H. PIGG,  
R. G. HARLESS,  
Special Attorneys,  
Bureau of Internal Revenue.

Filed at hearing Oct. 26, 1949, T.C.U.S.

The Tax Court of the United States

Docket Nos. 18515, 23902

OREGON CHROME MINES, INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Promulgated October 4, 1950

MEMORANDUM FINDINGS OF FACT  
AND OPINION

On or before June 24, 1941, petitioner acquired title to seven chrome mining claims in exchange for its entire capital stock, and thereafter it engaged in limited exploration and development of the mining properties until April 14, 1942. On that date it entered into a lease-royalty agreement relative to these mining claims whereby the lessee agreed to pay petitioner a gross royalty of 20 per cent upon all sales of chrome ore it might extract from the mining properties. Petitioner's income in 1944 consisted entirely of royalty payments received under the lease agreement. Held, that during the taxable year 1944 petitioner was not engaged in the mining of chromite within the meaning of Section 731 of the Internal Revenue Code, and therefore its adjusted excess profits net income in that year was not exempt from the excess profits tax.

WILLIAM B. MURRAY, ESQ.,

For the Petitioner.

ROBERT G. HARLESS, ESQ.,

For the Respondent.

These proceedings arise by reason of respondent's determination of deficiencies in income, declared value excess profits, and excess profits taxes for the calendar years 1944 and 1945 in the following amounts:

	1944	1945
Income tax .....	\$ 875.57	\$648.12
Declared value excess profits tax.....	2,651.96	493.94
Excess profits tax .....	15,404.74	.....

Petitioner has withdrawn its claim that in both 1944 and 1945 it was entitled to the use of cost depletion rather than percentage depletion and as this constituted petitioner's sole allegation of error in Docket No. 23902, abandonment of the claim thereby disposes of petitioner's appeal in respect to the deficiencies for 1945. The respondent has also conceded that in determining the deficiencies in Docket No. 18515, he erroneously disallowed a deduction for salaries and wages in 1944 in the amount of \$2,491.85.

As a result of these concessions, the sole remaining issue is whether all or any part of the petitioner's adjusted excess profits net income for the taxable year 1944 was exempt from excess profits tax by virtue of the provisions of Section 731 of the Internal Revenue Code.

### Findings of Fact

Part of the facts were stipulated and are so found.

Petitioner is a corporation organized on June 13, 1941, under the laws of the State of Oregon. By its articles of incorporation it is authorized to engage

in the mining, buying and selling of all kinds of ores, metals and minerals as well as to acquire and dispose of mining claims and properties. Its Federal tax returns for the years 1944 and 1945 were filed with the collector of internal revenue for the district of Oregon.

Petitioner's authorized capital stock consists of 48,000 shares of common stock of the par value of \$1 per share, all of which stock is issued and outstanding. On or before June 24, 1941, the petitioner acquired title to seven chrome mining claims located in Josephine County, Oregon, known as Agnes No. 1 to Agnes No. 7, inclusive, in exchange for its entire capital stock.

During the First World War, the Agnes mining claims had produced approximately 5,000 tons of chrome ore. As chrome ore is normally imported into this country, the prior owners allowed the claims to lapse and revert to the Government some time after the conclusion of the First World War.

Prior to June 24, 1941, title to the Agnes mining claims was held by Sig Dilsheimer for the benefit of himself and other persons who contributed various sums of money with the understanding that a corporation would be formed in which they would receive stock interests in return for such advances. Examination of the abandoned mining site had convinced them that there was a reasonable prospect of getting at least 5,000 more tons of chrome from these mining properties.

On June 24, 1941, Dilsheimer, by deed, conveyed the claims to the petitioner in return for 47,997

shares of its capital stock and thereafter distributed a portion of this stock to those persons who had contributed funds prior to the incorporation of petitioner. The remaining three shares of petitioner's stock were issued to Max Krueger, J. C. Haas and Garfield Voget, as qualifying shares and as part of the transaction whereby petitioner acquired the mining claims. No other consideration was received by petitioner in return for its capital stock.

On July 2, 1941, petitioner borrowed the sum of \$5,000 from Garfield Voget to use for operating expenses in developing the Agnes mining claims. Prior to April 12, 1942, petitioner completed several hundred feet of tunnel work and engaged in raising, drifting and cross-cutting to find ore.

On April 14, 1942, petitioner entered into a written lease with William S. Robertson whereby petitioner leased the Agnes mining claims to Robertson. The terms of the lease stated in pertinent part:

The lessor agrees:

1. Oregon Chrome Mines, Inc., leases to William S. Robertson the above claims for a period of two years from date with an option of two additional years if the recovery from said claims is reasonably successful during the first two years.

2. Oregon Chrome Mines, Inc., agrees that each year it will file with the proper authorities proof of labor for the past year so that title to said claims will remain in the corporation and locations to said claims be kept valid.

3. Oregon Chrome Mines, Inc., will keep its corporate franchise intact, keep its corporate taxes paid, and will pay all governmental and state charges against said claims.

The lessee agrees:

1. To furnish such equipment, tools, and machinery, and labor as will be necessary to work said claims, and to explore said ground to determine if the said land contains chrome ore, and if the said claims contain chrome ore he agrees to mine said claims and to ship said ore to market and to sell same to his best advantage.

2. The lessee, above named, shall open, use, and work said mines as is usual and customary in the skillful and proper mining operations of similar character, and shall perform or cause to be performed at least 1,000 man hours labor at said claims, beginning not later than May 20, 1942, and ending not later than August 20, 1942, and after he has expended said hours labor on said claims he shall have the right to cancel this lease by giving ten days' written notice to the lessor and then he shall have the right to forthwith remove any and all equipment, tools, and machinery that he has placed on said claims.

3. The lessee, above named, shall pay all expenses of operation, including labor, and shall pay all state and governmental taxes in con-



nection with his own operation. He shall carry state industrial accident insurance.

4. The lessee, above named, agrees to pay the lessor as rent and royalty for the use and depletion of said claims and the taking of said chrome ore one-fifth or 20 per cent of any and all amounts he shall receive from sale of said ore. This 20 per cent to be a gross royalty and from 80 per cent of the amount he shall receive from the sale of said ore he shall pay for the expense of operation. In other words, the lessee is to pay the lessor a 20 per cent gross royalty.

The lessee agrees to seasonably sell the ore that he has mined and to furnish the lessor a duplicate statement of the amount received by him for the sale of said ore. Ten days after he has received his pay for the ore he agrees to pay one-fifth thereof or 20 per cent to the lessor.

The lease was modified subsequently, but such modification related only to the amount of the gross royalty to be paid to the petitioner under the lease. The lease, as modified, was in effect during the period under consideration. Subsequent to the execution of the lease and during the taxable year in question, petitioner's income consisted entirely of royalty payments received under the lease agreement. Subsequent to April 12, 1942, petitioner neither directly nor indirectly took part in completing the development of these mining properties or the extraction and marketing of chrome therefrom.

The chrome ore extracted from the Agnes mining claims was of a very high grade and during the period under consideration constituted one of the largest sources of high grade chrome in the United States.

Petitioner occasionally made inquiries concerning the purchase of other chrome mining properties, but at the close of 1944 had not closed any deals for the acquisition of additional mining claims. In July, 1944, petitioner's directors did authorize Heitschmidt, the company attorney, to purchase some previously mined chrome ore which the latter had been dickering for on his own and a check for \$3,000 was issued to him for that purpose.

In 1944 petitioner addressed a letter to the Commissioner of Internal Revenue requesting advice. In a reply thereto dated November 20, 1944, the Commissioner advised the petitioner that it was not considered to be a domestic corporation engaged in mining as contemplated by Section 731 of the Internal Revenue Code and consequently its adjusted excess profits net income was not exempt from the excess profits tax.

During the taxable year 1944 petitioner was not "engaged in the mining" of chromite within the meaning of Section 731 of the Internal Revenue Code.

### Opinion

Hill, Judge:

The narrow question for our determination in this proceeding is whether petitioner was "engaged



in the mining” of chromite within the meaning of Section 731<sup>1</sup> of the Code during the taxable year 1944 so that its adjusted excess profits net income was exempt from the excess profits tax. Section 731 was first enacted into law as part of the Second Revenue Act of 1940. The purpose of the statute was to stimulate the domestic discovery and production of certain strategic materials, including chromite, of which there was a shortage in this country. The exemption granted by Section 731 was withdrawn by the Revenue Act of 1941 with respect to taxable years beginning after December 31, 1940. The exemption was subsequently restored in substantially the same form by the Revenue Act of 1942. Section 207 of the Revenue Act of 1943 added to the list of strategic materials set out in the statute.

Our first consideration is the scope Congress intended to give the phrase “engaged in mining.” No definition of these words is contained within Section 731. We have carefully searched the legislative history of this section and found no clear-cut stand-

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<sup>1</sup>Sec. 731. Corporations Engaged in Mining of Strategic Minerals.

In the case of any domestic corporation engaged in the mining \* \* \* chromite \* \* \*, the portion of the adjusted excess profits net income attributable to such mining in the United States shall be exempt from the tax imposed by this subchapter. The tax on the remaining portion of such adjusted excess profits net income shall be an amount which bears the same ratio to the tax computed without regard to this section as such remaining portions bears to the entire adjusted excess profits net income.

ards set forth for determining whether a corporation is "engaged in mining" within the statute. The regulations relating to Section 731, Regulations 109, Section 30.731-1, and its successor, Regulations 112, Section 35.731-1, are of no help in clarifying the statutory phrase in question, and no court decisions have interpreted the language. Elsewhere in the Code under Section 114(b) (4)(B)<sup>2</sup> Congress gave a broader than usual definition of "mining" and by the express language of that subparagraph its principles are applicable in determining gross income attributable to mining for the purposes of Section 731. It states that "mining," as used therein, includes "not merely the extraction of the ores or minerals from the ground but also the ordinary

<sup>2</sup>Sec. 114. Basis for Depreciation and Depletion.

\* \* \*

(b) Basis for Depletion:

\* \* \*

(4) Percentage Depletion for \* \* \* Metal Mines \* \* \*.

(B) Definition of Gross Income from Property.—As used in this paragraph the term "gross income from the property" means the gross income from mining. The term "mining," as used herein, shall be considered to include not merely the extraction of the ores or minerals from the ground, but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products. \* \* \* The principles of this subparagraph shall also be applicable in determining gross income attributable to mining for the purposes of Sections 731 and 735.

treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products." The more usual and ordinary definition of "mining" does not include the treatment processes. Webster's New International Dictionary, 2d Ed., states that "mining" is the "Act or business of making or of working mines." Black's Law Dictionary, 3rd Ed., defines "mining" as "the process or business of extracting from the earth the precious or valuable metals, either in their native state or in their ores." Corpus Juris Secundum, Vol. 58, page 35, section 3, declares that "mining," as generally defined, is the process of extracting from the earth the rough ore or mineral; the act or business of making mines or working them." The Court of Appeals for the Tenth Circuit stated in *Chicago Mines Co. v. Commissioner*, 164 Fed. (2d) 785, 787, that "'Mining' thus connotes the removal of minerals from a natural deposit \* \* \*."

It is possible that Congress intended that the broad definition of "mining" set forth in Section 114 (b)(4)(B) should serve not only to determine income attributable to mining within Section 731, but also that this definition should furnish a guide post for determining whether a corporation was "engaged in mining" under the same section. In any event, whether we are guided by the statutory definition or by the usual and ordinary definition of "mining," we are convinced by the evidence that petitioner was not engaged in the mining of chro-

mite for the purposes of Section 731 in the taxable year.

In 1944 petitioner played an entirely passive role in the chrome mining industry as lessor of the Agnes mining claims, and received all of its income in the form of royalties from Robertson, the lessee. Following the lease agreement of April 14, 1942, petitioner had performed no function nor taken any financial risk in exploring these mining properties for ore, developing mines, extracting chromite therefrom and marketing the same. Nor was petitioner engaged in any other mining operations during the taxable year. There is evidence that it directed a few inquiries toward the purchase of other chrome mining claims and on one occasion authorized the expenditure of \$3,000 to acquire chrome which had already been mined. These negligible activities fall far short of any active policy of locating and developing other chrome deposits. We do not attach much significance to the fact that in the brief period from June 24, 1941, until April 12, 1942, petitioner explored and developed the Agnes mining properties to a limited extent. These same claims had previously been located and worked in World War I and were relocated and examined prior to petitioner's incorporation. There is no affirmative evidence that petitioner found any mineable deposit of chromite therein prior to April 12, 1942, and the express terms of the lease on that date plus the small capital commitment by petitioner for exploration refute any conclusion that it completed the exploration and development work there. Finally we

give little weight to this limited action on the part of petitioner because no further steps were taken towards active participation in mining operations there or elsewhere subsequent to April 14, 1942. Such activity was a mere isolated occurrence. Thus we conclude that in 1944 petitioner was not engaged in discovering deposits of chrome ore, building mines, extracting ore or treating same. It was not engaged in "mining" in the usual sense or as defined in section 114 (b)(4)(B).

It is a well recognized principle that tax exemptions are not be lightly inferred, *Heiner v. Colonial Trust Co.*, 275 U. S. 232; *United States v. Stewart*, 311 U. S. 60. In view of Congressional silence regarding lessors of mining properties, we are convinced it would be an undue extension of the statutory language to hold that Section 731 covers a corporation such as petitioner, which bought up a few mining claims in a proven area, which started but never completed the exploration or development of any mining properties nor extracted ore therefrom, and which quickly lapsed into the passive role of a lessor holding its claims for lease to a producer willing to carry out all the mining operations necessary to mine and market chromite. We therefore hold that in 1944 petitioner was not entitled to the exemption contained in Section 731. The concessions set forth in the stipulation of facts will be taken into account in the recomputation herein directed.



Petitioner abandoned the only error assigned as the basis of its petition in Docket No. 23902.

Reviewed by the Court.

In Docket No. 18515, decision will be entered under Rule 50.

In Docket No. 23902, decision will be entered for respondent.

Arundell, J., dissenting:

It seems to me that the construction given to Section 731 in the majority opinion is entirely too narrow and serves to defeat the very purpose of its enactment.

In 1940, there was a crying need for the production of certain strategic war materials, of which chromite was one. We had depended on foreign sources for our supply and the war activities of the enemy made likely the stoppage of our importations. To give encouragement to the discovery and development of our domestic sources of supply, Congress enacted Section 731 of the Internal Revenue Code which provided that:

In the case of any domestic corporation engaged in the mining of \* \* \* chromite \* \* \* , the portion of the adjusted excess profits net income attributable to such mining in the United States shall be exempt from the tax imposed by this subchapter.

There can be no question but that the income with which we are concerned was attributable to the

mining of chromite. But it is said that the petitioner was not engaged in mining and therefore may not have the benefit of the statute.

The petitioner was organized in 1941 for the sole purpose of taking title to a group of mining claims believed to contain chromite and with the view to their exploration and development. By April, 1942, it had opened tunnels and had performed various other work in order to locate the deposits of chromite and to prepare for the actual removal of the ore. Apparently the petitioner was financially unable to carry out the operation itself and a lease arrangement was made with Robertson under which the petitioner was to receive a gross royalty of 20 per cent of the amounts realized from the sales of ore.

To deny petitioner the benefits of Section 731 because it did not engage in the actual extraction of ore from the claims is to say that Congress intended only to accelerate the production of chromite from mines already existing and operating within the United States or to benefit only those firms possessed of sufficient financial resources to undertake and complete the exploitation of mining properties without outside assistance. In my opinion, this result is in direct conflict with the intent evidenced by Congress in its Committee Reports,\* which indi-

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\*See H Rep. No. 3002, 76th Cong., 3d sess., 1940-2 C.B. 548, 559; Cong. Record, Vol. 86, pp. 12347, 12348, 12920; H. Rep. No. 1040, 77th Cong., 1st sess., 1941-2 C.B. 413, 434; Cong. Record, Vol. 87, pp. 6710-11, 6725-26, 7440-41; S. Rep. No. 1631, 77th Cong., 2d sess., 1942-2 C.B. 504, 536-538.



cate that the statute was designed to encourage the discovery, exploration and development of mines containing these strategic metals as well as to encourage the day-to-day removal of the ore. Therefore, it seems to me that recognition of the underlying necessity for the extension of this exemption and the specific purposes of Congress in granting this benefit require that the petitioner be regarded as having been engaged in the mining of chromite within the meaning of Section 731 during 1944.

Van Fossan, Johnson and Tietjens, JJ., agree with this dissent.

[Tax Court Seal.]

Served Oct. 4, 1950.

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The Tax Court of the United States  
Washington

Docket No. 18515

OREGON CHROME MINES, INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

### DECISION

Pursuant to the determination of the Court as set forth in its findings of fact and opinion promulgated herein October 4, 1950, the respondent filed a recomputation of tax on November 7, 1950.

At the hearing on such recomputation held on November 29, 1950, there was no appearance for the petitioner. No objection has been filed to respondent's recomputation. It appearing that such recomputation is correct, it is

Ordered and Decided: That there are deficiencies in income tax, declared value excess profits tax and excess profits tax for the taxable year ended December 31, 1944, as follows:

Income Tax.....	\$ 870.17
Declared Value Excess Profits	
Tax .....	2,602.62
Excess Profits Tax .....	15,085.16

[Seal]           /s/ EUGENE BLACK,  
                    Judge.

Entered November 30, 1950.

Served December 1, 1950.

In the United States Court of Appeals  
For the Ninth Circuit

Docket No. 18515

OREGON CHROME MINES, INC.,  
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

PETITION FOR REVIEW OF THE DECISION  
OF THE TAX COURT OF THE UNITED  
STATES

Comes now the above-named petitioner and petitions for review of the decision of the Tax Court of the United States in the above-entitled cause, which decision was rendered November 30, 1950, pursuant to the determination of the Court set forth in its Memorandum Finding of Fact and Opinion (Honorable Judge Hill, Judge) entered on October 4, 1950, and by which the Court decided:

That during the taxable year 1944 petitioner was not engaged in the mining of chromite within the meaning of section 731 of the Internal Revenue Code, and therefore its adjusted excess profits net income in that year was not exempt from the excess profits tax.

The nature of the controversy is as follows:

Petitioner seeks reversal of said decision which sustained the determination of Respondent, Com-

missioner of Internal Revenue, as evidenced by his ninety day letter of February 18, 1948. Said deficiency in tax was computed by the disallowance to the petitioner of the excess profits exemption of Section 731 of the Internal Revenue Code. Said exemption was disallowed for the reason that the Tax Court determined, as a matter of law, that the petitioner was not engaged in mining chromite during the taxable year 1944 within the meaning of the aforementioned Section 731. Petitioner prays for review and reversal of said decision upon the ground and for the reason that it is not warranted by the findings of fact of the Tax Court and is contrary to said findings and is not in accordance with law, particularly in that the petitioner was engaged in mining chromite, a strategic mineral within the meaning of Section 731 of the Internal Revenue Code.

Petitioner applies for review of said decision by the United States Court of Appeals for the Ninth Circuit. Said Court has venue to review said decision for the reason that in said Circuit is located the Collector's Office, i.e., the Collector of Internal Revenue, Portland, Oregon, to which was made return for each and all of the taxes in respect of which the asserted liability arises.

/s/ WILLIAM B. MURRAY,  
Attorney of Record for  
Petitioner.

Received and filed Jan. 22, 1951. T.C.U.S.

[Title of Tax Court and Cause.]

NOTICE OF PETITION FOR REVIEW TO  
THE UNITED STATES COURT OF AP-  
PEALS FOR THE NINTH CIRCUIT

To the Commissioner of Internal Revenue, Respond-  
ent aboved named, and Charles Oliphant, At-  
torney of Record for Respondent:

Notice is hereby given of the filing by Oregon Chrome Mines, Inc., petitioner above named, of its petition for review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court of the United States entered in the above-entitled cause on November 30, 1950. A copy of said petition is attached hereto. Said petition is filed and this notice given pursuant to sections 1141 and 1142, Internal Revenue Code, and Rule 31 of the Rules of the United States Court of Appeals for the Ninth Circuit.

/s/ WILLIAM B. MURRAY,  
Attorney of Record for  
Petitioner.

Service of the original of the foregoing Notice of petition for review as prescribed by law and service of a copy of the Petition for review, is hereby admitted at Washington, D. C., this 3rd day of Jan., 1951.

/s/ CHARLES OLIPHANT, CWR  
Chief Counsel, Bureau of  
Internal Revenue.

Received and filed Jan. 22, 1951.

[Title of Court of Appeals and Cause.]

NOTICE OF FILING PETITION FOR REVIEW AND STATEMENT OF POINTS AND DESIGNATION OF RECORD

To: Charles Oliphant, Chief Counsel, Bureau of Internal Revenue.

You are hereby notified that the above petitioner did, on the 22nd day of January, 1951, file with the Clerk of the Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit, of the decision of this Court heretofore rendered in the above-entitled case. Copies of the petition for review and the statement of points and designation of record as filed are hereto attached and served upon you.

Dated this 23rd day of January, 1951.

/s/ VICTOR S. MERSCH,  
Clerk, The Tax Court of the  
United States.

Service of copies of Petition for Review and Statement of Points acknowledged this 23rd day of January, 1951.

/s/ CHARLES OLIPHANT, CWR  
Chief Counsel, Bureau of  
Internal Revenue,  
Attorney for Respondent.

Filed Jan. 23, 1951. T.C.U.S.



[Title of Tax Court and Cause.]

DESIGNATION OF RECORD TO BE  
CERTIFIED

Petition for Review to the United States Court of  
Appeals for the Ninth Circuit

To the Clerk of the Tax Court of the United States:

In connection with the Petition for Review of the decision of the Tax Court of the United States in the above-entitled matter filed in the above-named petitioner, it is respectfully requested that you prepare in accordance with Rules 75 and 76 of the Rules of Civil Procedure of the District Courts of the United States, certify, transmit to and file with the United States Court of Appeals for the Ninth Circuit within forty days after the filing of said petition a typewritten copy of a portion of the record in that cause for review.

It is designated that copies of the following portions of the record be prepared, certified, transmitted and then filed with said United States Court of Appeals for the Ninth Circuit: i.e. (1) the Docket Entries; (2) Amended Petition; (3) Answer to Amended Petition; (4) Memorandum Findings of Fact and Opinion; (5) Petition for Review and Notice of Filing Petition for Review, with proof of service thereof; (6) Designation of Record to be Certified; (7) Statement of Points; (8) Decision.

/s/ WILLIAM B. MURRAY,  
Attorney of Record for  
Petitioner.



Service of the original of the foregoing Designation of Record to be Certified as prescribed by law and service of a copy of the Designation of Record to be Certified, is hereby admitted at Washington, D. C., this 3rd day of Jan., 1951.

/s/ CHARLES OLIPHANT,  
Chief Counsel, Bureau of  
Internal Revenue.

Received and filed Jan. 22, 1951. T.C.U.S.

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[Title of Tax Court and Cause.]

CLERK'S CERTIFICATE

I, Victor S. Mersch, Clerk of the Tax Court of the United States do hereby certify that the foregoing documents, 1 to 8, inclusive, constitute and are all of the original papers and proceeding on file in my office as called for by "Designation of Record" in the proceeding before the Tax Court of the United States in the above-entitled proceeding and in which the petitioner in The Tax Court proceeding has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 30th day of January, 1951.

[Seal]      /s/ VICTOR S. MERSCH,  
Clerk.

[Endorsed]: No. 12856. United States Court of Appeals for the Ninth Circuit. Oregon Chrome Mines, Inc., Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed February 16, 1951.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals  
For the Ninth Circuit

OREGON CHROME MINES, INC., a Corpora-  
tion,

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent on Review.

### STATEMENT OF POINTS

Now comes the petitioner on review in the above-designated proceedings, and hereby designates the following points upon which it intends to rely:

1. The Tax Court erred in ordering and deciding that there is a deficiency in income tax of \$870.17, declared value excess profits tax of \$2602.62, and excess profits tax of \$15,085.16.

2. The Tax Court erred in holding that during the taxable year 1944, petitioner was not engaged in the mining of chrome within the meaning of section 731 of the Internal Revenue Code, and therefore its adjusted excess profits net income in that year was not exempt from the excess profits tax.

/s/ WILLIAM B. MURRAY,  
Counsel for Petitioner.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 12, 1951. U.S.C.A.

In the United States Court of Appeals  
For the Ninth Circuit

No. 18515

OREGON CHROME MINES, INC., a Corpora-  
tion,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

DESIGNATION OF RECORD TO BE  
PRINTED

To: The Clerk of the United States Court of Ap-  
peals for the Ninth Circuit:

Comes now the petitioner appellant and designates  
the record to be printed in accordance with the  
rules of the above-entitled Court as follows:

- (1) The Docket Entries.
- (2) Amended Petition.
- (3) Answer to Amended Petition.
- (4) Memorandum Findings of Fact and Opinion.
- (5) Petition for Review and Notice of filing  
Petition for Review with proof of service  
thereof.
- (6) Designation of Record to be Certified.
- (7) Statement of Points.

(8) Decision of the Tax Court of the United States.

/s/ WILLIAM B. MURRAY,  
Attorney of Record for  
Petitioner.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Feb. 12, 1951. U.S.C.A.

